IT 01-0007-PLR 07/13/2001 APPORTIONMENT – SALES FACTOR

Private Letter Ruling: Letter Ruling IT 89-0212, stating that taxpayer has no Illinois apportionment factors, is revoked. Taxpayer was entitled to rely on that letter ruling prior to revocation, and so is not subject to tax or penalties prior to revocation.

July 13, 2001

Dear:

This is in response to your letter dated July 11, 2001, in which you request a Private Letter Ruling on behalf of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of 86 Ill. Adm. Code Section 1200.110 appears to be contained in your request. The Private Letter Ruling will bind the Department only with respect to xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

The facts and analysis as you have presented them are as follows:

We are submitting this written request for a Private Letter Ruling pursuant to 86 Ill Adm. Code Section 1200.110 and subsection (b) (1) through (8) thereof. We represent xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx,[1] incorporated under the laws of the State of Missouri on December 26, 2962 (hereinafter sometimes referred to as "Taxpayer"). Taxpayer FEIN is xx-xxxxxxx. Taxpayer is not under audit by the Department nor is there any litigation pending with the Department and Taxpayer.

We are requesting a reaffirmation of a previous Private Letter Ruling issued to Taxpayer, IT 89-0212. Taxpayer's business operations are quite complicated from a state and local tax perspective and this complexity may result in more than one interpretation of the essence of what Taxpayer does, i.e., is Taxpayer primarily a "service provider" or primarily a "seller of tangible personal property"? The answer to that question may determine whether and how much income should be allocated to Illinois under the Illinois sales factor. Taxpayer wants assurance that the Department has interpreted Taxpayer's income tax situation correctly. Taxpayer wants assurance that it should continue to allocate no income to Illinois based upon the conclusion drawn in an earlier private letter ruling issued to Taxpayer that no income should be allocated to Illinois. Should the Department now draw a different conclusion, Taxpayer wants any change in treatment to be made on a prospective basis only based upon both the Department's and Taxpayer's obvious reliance upon Private Letter Ruling IT 89-0212.

FACTS PERTAINING TO THE RULINGS BEING REQUESTED

In 1989, one of the Department's Revenue Collection Officers contacted Taxpayer to determine whether Taxpayer should be paying Illinois income tax. Taxpayer conferred with its local outside CPA firm because Taxpayer's only accounting personnel consisted of one bookkeeper during those years who was not formally trained in matters of tax law. Indeed, Taxpayer's former bookkeeper did not possess a college

education. Taxpayer's local CPA firm, in turn, engaged an Illinois CPA firm with expertise in Illinois income tax law and multi-state tax matters as Taxpayer's local CPA firm did not possess any expertise in Illinois income tax law. Through its local CPA firm, Taxpayer responded fully to all questions posed to it by the Revenue Collection Officer and completely informed the Department of Taxpayer's operations. However, because of the complex nature of Taxpayer's operations even the Revenue Collection Officer could not make an independent determination of whether Illinois income tax was due. The Revenue Collections Officer requested Taxpayer to undertake the time and expense to obtain a Private Letter Ruling from the Department's legal division. Taxpayer agreed. During the entire process of making the Private Letter Ruling request there was extensive contact between Taxpayer's local CPA firm, the Illinois CPA firm, the Revenue Collections Officer and one or more employees in the Department's legal division. All of those contacts were aimed at ascertaining whether Taxpayer owed Illinois income tax. Taxpayer was attempting to comply with whatever the written determination was. Taxpayer's only concern was and is that it receive a "written determination" upon which it could rely.

Before Taxpayer received its Private Letter Ruling from the Department, the Illinois CPA firm had made an independent determination that Taxpayer was not liable for Illinois income tax on the theory that Taxpayer is protected by the safe harbor of Public Law 86-272. The Illinois CPA firm seems to have categorized Taxpayer as primarily a seller of tangible personal property. Taxpayer maintains no office in Illinois, keeps no property in Illinois and does not even perform solicitation activities in Illinois. For those reasons, coupled with the facts that Taxpayer either ships the custom order property it fabricates by common carrier to Illinois, or drops it off in its own trucks at job sites in Illinois where it is erected by it's subcontractors, the Illinois CPA firm appears to have theorized that Taxpayer's activities in Illinois fall within the safe harbor of Public Law 86-272. Indeed, that safe harbor is the basis and the theory upon which Taxpayer's local CPA firm submitted the private letter ruling request at issue. The Private Letter Ruling request was made prior to the United States Supreme Court's opinion in *Wisconsin v. Wrigley*. Taxpayer did not understand the theory developed by the Illinois CPA firm and utilized by its local CPA firm in the Private Letter Ruling request. Taxpayer was relying exclusively upon the expertise of these firms to handle the Private Letter Ruling request.

In late July, 1989, the Illinois CPA firm that had been in contact with the Department's legal division responded verbally to the legal division's questions about Taxpayer's operations. The legal division advised verbally that no tax was due and shortly thereafter the formal request for the private letter ruling was submitted by Taxpayer's local CPA firm. SEE ATTACHMENT NO. I for a copy of the Private Letter Ruling request, dated August 2, 1989.

In the middle of August 1989, the Department's attorney who was assigned the Private Letter Ruling request telephoned Taxpayer's local CPA firm and that attorney questioned Taxpayer's CPA firm as to several aspects of the facts. On August 29, 1989, the Department issued Private Letter Ruling IT 89-0212, dated August 29, 1988.

In that ruling the Department determined that Taxpayer is a service provider and would have no business income required to be apportioned to Illinois. The ruling advises that "$0" income tax returns nevertheless be filed with Illinois. Taxpayer did not understand the basis upon which Private Letter Ruling IT 89-0212 is premised but understood only that no Illinois tax was due. SEE ATTACHMENT NO. II for Private Letter Ruling IT 89-0212.

Taxpayer relied on its CPA firm to prepare and submit to Taxpayer the federal income tax returns and the state income tax returns that it should file and Taxpayer relied upon its CPA firm as to the amount of tax it should pay with those returns. Taxpayer never filed an Illinois income tax return because its CPA firm never prepared and sent an Illinois income tax return to Taxpayer to sign and file.

Taxpayer continues to use the same CPA firm to this day. It is Taxpayer's position that its outside CPA firm advised there was no need to file Illinois tax returns as no Illinois tax is due. Accordingly, no Illinois income tax returns have been filed.

Taxpayer is a registered taxpayer with the Department for Use Tax. In 1993 or 1994, the Department once again contacted Taxpayer to inquire as to why Taxpayer is not paying Illinois income tax. Taxpayer assumes that the telephone call originated as a result of a then recently completed Illinois Use Tax audit. Taxpayer's then-new Controller, who is a CPA, informed the Department official of the existence of Private Letter Ruling 89-0212 and of the fact that Taxpayer had been advised that it had no taxable income in Illinois. The Department official was aware of the Private Letter Ruling as he stated that he had a copy of it in front of him as he spoke with the Controller. The Department official stated that he wanted to confirm that the factual information regarding Taxpayer's operations had not changed. The Controller informed the Department official that he was too new in his position with the Taxpayer to know the answer to that question. xxxxxxxxxxxxxxx, Vice President of Taxpayer, then discussed Taxpayer's operations with the Department official who asked specific questions about Taxpayer's subcontractors and other matters contained in the Private Letter Ruling. The Vice President of Taxpayer then turned the call back over to the Controller. The Department official informed Taxpayer that he was satisfied with the answers, that Taxpayer has no Illinois income tax liability and that the Department official would confirm the conversation in a letter. Taxpayer has never received that letter.

Taxpayer's Controller has no formal training or background in Illinois income tax laws. However, Taxpayer's Controller has become increasingly familiar with multi-state income tax issues in general and, approximately two years ago, contacted an international accounting firm seeking a more in-depth understanding of Illinois income tax law as it pertains to Taxpayer. As a result of that engagement, which was a lengthy engagement that ended recently, Taxpayer's Controller is aware that IT 89-0212 may not apply the correct Illinois law.

To recap this situation, prior to the date on which the Department promulgated regulations bifurcating the letter rulings it issues into “General Information Letters” and “Private Letter Rulings” Taxpayer, through an outside CPA firm, sought and received a favorable Private Letter Ruling relieving Taxpayer from any Illinois income tax liability but advising Taxpayer that “0” Illinois income tax returns should be filed. Taxpayer has not filed any returns for two primary reasons: Taxpayer has relied on its CPA firm and upon the two contacts by the Department's officials.

Taxpayer is a highly skilled fabricator of structural steel that is used in constructing buildings. Taxpayer is known and hired by general contractors because of its skill in fabricating steel, not for the quality or grade of steel that Taxpayer uses: such quality and grade of steel can be obtained virtually anywhere by general contractors erecting buildings in the United States. Taxpayer is hired because of the premiere services it renders in fabricating steel to meet the customized expectations of general contractors for the particular building being built.

Taxpayer remains willing to comply with Illinois law, just as it has since the Department’s Revenue Collection Officer first contacted Taxpayer in 1989, but seeks assurance that the written determination upon which it has been relying is accurate. Taxpayer does not want to be penalized for relying on its outside CPA firm, and upon the written determination contained in Private Letter Ruling 89-0212, and upon the lengthy conversation with a Department Official in 1993 or 1994. Taxpayer emphasizes that it has been attempting to obtain reassurance on this particular matter for nearly two years.

RULING REQUESTED

Taxpayer seeks a ruling from the Department that the ruling contained in Private Letter Ruling IT 89-0212 is correct. In other words, if the Department determines that Private Letter Ruling IT 89-0212 applies the correct law to Taxpayer’s activities, then the Department would rule that no Illinois income tax was due or will be due in the future. Moreover, Taxpayer seeks as a part of this ruling, a determination that it would not be required to undertake the time and expense to file “zero tax” returns for any prior tax year on the reasoning that no past tax year remains open, due to its showing of reasonable cause for not filing those returns. Under section (b) of 35 ILCS 735/3-10 the Department could require as many as 6 past years’ income tax returns be filed. However, Taxpayer has demonstrated that it actually and reasonably relied on its outside CPA firm for advice as to whether Illinois income tax returns were to be filed. Moreover, Taxpayer was not made aware of this issue during its encounter with the Department official in 1993 or 1994. Failure to file returns has been brought to this Taxpayer’s attention only recently by virtue of its engagement with the international accounting firm and by virtue of its engagement with its present representative. From the moment this issue was raised to Taxpayer, Taxpayer, as it has always done with regard to any potential Illinois tax obligation, has sought to contact the appropriate officials at the Department in order to comply. This unique fact pattern constitutes reasonable cause sufficient in Taxpayer’s view to negate any requirement to file any

back tax returns. Finally, Taxpayer seeks as a part of this ruling that Illinois income tax returns for tax year 2000 and subsequent tax years will reflect no income allocated to Illinois but must be filed since Taxpayer is registered to do business in Illinois.

ALTERNATIVE RULING REQUESTED

Alternatively, Taxpayer seeks a ruling that the Department will honor its own Private Letter Ruling, Private Letter Ruling IT 89-0212, in accord with the provisions of 86 Ill. Admin. Code Sec. 1200.110 and the Taxpayer Bill of Rights. In other words, should the Department now take the position (now that Taxpayer has raised the issue to the Department's attention) that the Department's own Private Letter Ruling IT 89-0212 applies the wrong sections of the Illinois Income Tax Act to Taxpayer, and that Taxpayer should allocate some income to Illinois, Taxpayer seeks a ruling that no back taxes, including estimated taxes, interest, penalties or tax returns for any prior tax year or portion thereof while the existing IT 89-0212 is extant are due. If IT 89-0212 were to be revoked, then, on a prospective basis, income would begin to be allocated to Illinois, estimated tax payments would begin to be due, etc.

Taxpayer is asking the Department to determine that, under subsection (b) of 35 ILCS 735/3-10 no prior tax years are open on the ground that Taxpayer met its burden to demonstrate that it had reasonable cause for failure to file income tax returns. Reasonable cause is found by virtue of the reasons set forth in this letter. In seeking this alternative ruling, Taxpayer is also asking that the Department determine that Private Letter Ruling IT 89-0212 constitutes "erroneous written information or advice given by the Department" within the meaning of the Taxpayers' Bill of Rights Act, 20 ILCS 2520/2. Although the language of the Taxpayers Bill of Rights contains no explicit reliance requirement, Taxpayer has been made aware that such a requirement must be met in the Department's view and is, therefore, seeking as part of this ruling request a ruling that Taxpayer reasonably relied upon the erroneous written information or advice given by the Department, i.e., the Department's Private Letter Ruling IT 89-0212. Finally, as part of this alternative ruling request, Taxpayer seeks instruction from the Department regarding Taxpayer's obligation to file income tax returns in the future, should the existing Private Letter Ruling IT 89-0212 be revoked.

DISCUSSION OF THE PERCEIVED NEED FOR THE REQUESTED RULINGS

Taxpayer has experienced personnel changes since the issuance of Private Letter Ruling IT 89-0212. The Controller and the outside representatives that Taxpayer has used recently to make contacts with the Department have changed since the issuance of the Private Letter Ruling. Taxpayer's new Controller and outside representatives engaged for this contact now question the correctness of the Private Letter Ruling. The primary motivation in seeking both Private Letter Ruling 89-0212 and this private letter ruling is to comply voluntarily with Illinois income tax laws. In so doing, Taxpayer seeks assurance that, if the Department applied the wrong law in issuing Private Letter Ruling 89-0212, the Department will nevertheless stand by that ruling and apply the correct law on a prospective basis only, thereby relieving Taxpayer of any concern that the

Department would seek back taxes, interest, penalties or tax returns for any tax year or portion thereof while th existing IT 89-0212 is extant.

Taxpayer is coming forward to request these rulings on its own accord and is not under audit from the Department.

The particular subsection of the Illinois Income Tax Act, Section 304 (a) (3) (C) upon which the Department relied *sua sponte* in issuing Private Letter Ruling IT 89-0212 has not been amended to our knowledge since the issuance of the Private Letter Ruling.

To the best of the knowledge of both Taxpayer and Taxpayer's representative the Department has not previously ruled on the same or a similar issue for Taxpayer, and neither Taxpayer nor Taxpayer's representative has previously submitted the same or a similar issue to the Department but withdrew it before a letter ruling was issued. Accordingly, we seek this ruling.

AUTHORITIES SUPPORTING TAXPAYER'S REQUEST:

The Uniform Penalty and Interest Act, 35 ILCS 735/3-10 provides in pertinent part:

Sec. 3-10. Limitations…

(b) In the case of a failure to file a return required by law, the tax may be assessed at any time. If the taxpayer shows that there was reasonable cause for failure to file a return, the period shall be limited to not more than 6 years after the original due date of each return required to be filed.

In this case, Taxpayer asserts that there was reasonable cause for failure to file returns as Taxpayer relied upon its outside CPA firm and Taxpayer relied upon the substance of the conversations and the outcome of the two contacts by the Illinois Department of Revenue personnel.

The Taxpayers' Bill of Rights Act, 20 ILCS 2520/1 provides in pertinent part:

Sec. 4. Department responsibilities. The Department of Revenue shall have the following powers and duties to protect the rights of taxpayers: …

(c) To abate taxes and penalties assessed based upon erroneous written information or advice given by the Department.

Although the statutes of Illinois do not provide the additional explicit requirement that, in order for Section 4 c) to be applicable, a taxpayer must make an independent showing that it reasonably relied upon the erroneous written information or advice given by the Department, the Department does take that position.

Taxpayer asserts that it reasonably relied upon Private Letter Ruling 89-0212 from the date of its issuance to this day and that it is protected by the Taxpayers' Bill of Rights Act due to that reliance. Taxpayer asserts that the appropriateness of its reliance on Private Letter Ruling 89-0212 is reconfirmed by the fact that the Revenue Collections Officer who contacted Taxpayer in 1989 relied upon it. Moreover, the second contact of Taxpayer in 1993 or 1994 by a Department official confirms the appropriateness of Taxpayer's reliance on the ruling as that Department Official questioned Taxpayer extensively whether Taxpayer's facts had changed and then agreed that Taxpayer owed no income tax to Illinois.

Case law, too, supports Taxpayer in this situation. As a general matter, estoppel does not lie against the State, especially in matters pertaining to the revenues. In *Philger, Inc. v. The Department of Revenue,* 208 Ill. App.3d 1066, 567 N.E.2d 773 (1990), however, the Illinois Appellate Court for the Fifth District found estoppel to lie in a tax case against the Department based upon oral advice given by a Department employee to the taxpayer, and relied upon by the taxpayer to its detriment. In *Philger,* the Department of Revenue pointed to "the case of *Austin Liquor Mart, Inc. v. Department of Revenue* (1972), 51 Ill.2d 1, 280 N.E.2d 437, in which our supreme court held the general rule is that the government is not estopped from collecting a tax due because of previous mistakes or misinformation of its agents in attempting to collect the tax. What [the Illinois Department of Revenue] fails to mention is the corollary to this rule, also stated in *Austin Liquor Mart, Inc.,* that the State does not have absolute immunity from the application of equitable principles, and the State can be estopped in the exercise of its power of taxation or the collection of revenue in order to prevent fraud or injustice. (51 Ill. 2d at 6, 280 N.E.2d at 440). In the instant case, it would be an injustice for plaintiff to be required to pay the additional $20,000 demanded by [the Department of Revenue]. The $20,000 which [the Department] seeks was a tax on sales made by [the taxpayer]. Had [the Department] demanded the money prior to the closing of the sale [of the taxpayer's business], the $20,000 could have been deducted from the purchase price." *Philger* at ____. So, too, in this matter. It would constitute a mighty injustice were the Department to revoke retroactively Private Letter Ruling 89-0212 and assert, contrary to the language contained in that ruling, that Taxpayer should have allocated taxable income to Illinois for the past decade or more and that taxpayer owes back tax along with interest.

Finally, although estoppel does not generally lie against the State especially in matters pertaining to the revenues, the Department on its own accord -and to its credit- has initiated and, for decades, honored an administrative practice of respecting its own Private Letter Rulings vis-a-vis the taxpayer to whom the Private Letter Ruling was written. In the seminal law review article published in 1961 by the venerable Willard Ice., Esq., former General Counsel of the Department, Mr. Ice reveals the Department's practice of respecting its own rulings:

Informal Rulings

> When a taxpayer wishes to obtain a special statement of the Department's position with respect to a particular problem, the taxpayer or his representative may write to the Department of Revenue [footnote omitted] or confer with representatives of the Department and obtain a written ruling, in the form of a letter outlining the Department's answer to the question presented. These rulings are accepted as binding by the Department until revoked or until they are superseded by the revision of an applicable official rule of the Department or by the issuance of a new formal rule covering the subject….

University of Illinois School of Law Journal, Volume 1961, Winter, 1961 "Taxation In Illinois: The Retailers' Occupation Tax Act" at pps. 636-37.

AUTHORITIES CONTRARY TO TAXPAYER'S VIEWPOINT

Neither Taxpayer nor Taxpayer's representative is aware of any authorities contrary to Taxpayer's view. In *Material Service Corporation v. Department of Revenue,* 89 Ill.2d 382 (1983) the taxpayer sought and received a private letter ruling in 1966 that stated in pertinent part that "In reply to your request for a ruling concerning minimum load charges…which are separately contracted for and separately charged, please be advised that they are excludable in the computation of retailers' occupation tax." Taxpayer subsequently received a Notice of Tax Liability for unpaid Retailers' Occupation Tax on 12,500 minimum load charges made to customers of the taxpayer who purchased small loads of rock from the taxpayer. The Circuit Court held that the Department was estopped from assessing tax by the private letter ruling issued to that taxpayer. The appellate court reversed and the Supreme Court affirmed the appellate court's reversal on the fact that the taxpayer in that case was found to have not separately contracted for and separately charged the minimum load charges as required by the private letter ruling. Accordingly, the private letter ruling simply did not apply.

Taxpayer in this case contends that its failure to file returns has no bearing on the application of the substantive ruling contained in IT 89-0212 which is that Taxpayer has no allocation of income to Illinois. Moreover, a specific statutory provision in Illinois law, 35 ILCS 735/3-10 (b) provides for the treatment of taxpayers who fail to file returns. Where a taxpayer can show that it had reasonable cause for failure to file returns, as Taxpayer can in this situation, the *Material Service Corporation* case does not then act to "take away" the protection otherwise afforded to the taxpayer.

There is contained herein no trade secret information that Taxpayer seeks to be deleted from any publicly disseminated version of the Private Letter Ruling that Taxpayer seeks.

Ruling

Apportionment Factor

In IT 89-0212, the Department of Revenue analyzed the application to xxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx of Section 304(a)(3)(C) of the Illinois Income Tax Act (the "IITA"; 35 ILCS 5/101 *et seq.*). That subsection provides the rules for inclusion in the Illinois sales factor numerator of gross receipts from transactions other than the sale of tangible personal property. However, you have represented that xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx collects and remits Use Tax to Illinois on its sales to Illinois customers, and a Use Tax collection obligation is imposed only on sales at retail of tangible personal property. *See* Sections 2 and 9 of the Use Tax Act (35 ILCS 105/2 and 105/9). Accordingly, the sales factor rule applicable to xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx is Section 304(a)(3)(B) of the IITA, which provides, in part:

> Sales of tangible personal property are in this State if:
>
> (i) The property is delivered or shipped to a purchaser, other than the United States government, within this State regardless of the f.o.b. point or other conditions of the sale.

Assuming xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx has nexus with Illinois, gross receipts from its sales of fabricated steel products delivered to Illinois sites must therefore be included in the Illinois numerator of its sales factor. Letter Ruling IT 89-0212 is in error in stating that xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxx would have no Illinois sales factor numerator in this instance, and is therefore revoked.

Nexus

Given the factual nature of the determination of whether or not a taxpayer has sufficient nexus with the State of Illinois in order to be subject to Illinois income tax, the Department of Revenue has determined that it cannot issue a Private Letter Ruling making such a determination which could properly bind the Department of Revenue. In the present case, you have represented that structural steel products fabricated by xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx are installed in Illinois by its subcontractor. 86 Ill. Adm. Code Section 100.9720(c)(4)(D) provides that "[i]nstallation or supervision of installation at or after shipment or delivery" is not an activity protected by Public Law 86-272. Accordingly, if the installation by the subcontractor can be attributed to xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxx, it will have nexus with Illinois and gross receipts from the sales of its products delivered or shipped to a purchaser in Illinois will be included in the Illinois numerator of its sales factor. However, no ruling is given on this issue.

Filing Requirements

Section 502(a) of the IITA provides:

> A return with respect to the taxes imposed by this Act shall be made by every person for any taxable year:

(1) For which such person is liable for a tax imposed by this Act, or

(2) In the case of a resident or in the case of a corporation which is qualified to do business in this State, for which such person is required to make a federal income tax return, regardless of whether such person is liable for a tax imposed by this Act.

As a corporation qualified to do business in Illinois, xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx is therefore required to file an Illinois income tax return for each taxable year for which it is required to file a federal income tax return, even if it has no Illinois income tax liability. Accordingly, Letter Ruling IT 89-0212 instructed xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx to file Illinois income tax returns, even though, under that ruling, its apportionment factor would be zero and it would have not Illinois net income.

Liability for Tax Years Ending Prior to the Revocation of Letter Ruling IT 89-0212

Section 4 of the Taxpayers' Bill of Rights Act (20 ILCS 2520/4) provides, in part:

> The Department of Revenue shall have the following powers and duties to protect the rights of taxpayers:
>
> * * *
>
> (c) To abate taxes and penalties assessed based upon erroneous written information or advice given by the Department.

The Taxpayers' Bill of Rights Act was enacted in Public Act 86-176, effective January 1, 1990, subsequent to the date on which Letter Ruling 89-0212 was issued, August 29, 1988. However, there is nothing in the Taxpayers' Bill of Rights Act indicating that Section 4(c) can or should be applied only to erroneous written advice given by the Department after the effective date of that act or to tax liabilities arising after the effective date of that act. In Illinois, the general rule is that a court should apply the law as it exists at the time of its decision. *First of America Trust Co. v. Armstead,*171 Ill.2d 282, 289 (1996).

In addition, at the time Letter Ruling 89-0212 was issued, 86 Ill. Admin. Code Section 100.9005(b) provided that xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx could rely on that ruling. That provision (after being recodified as Section 100.9800(b)) was repealed in 1993, after the Taxpayers' Bill of Rights Act took effect.

Regulation Section 100.9005(b) and Section 4(c) of the Taxpayers' Bill of Rights Act would therefore require abatement of any Illinois income taxes arising prior to the date of this letter revoking Letter Ruling 89-0212 and assessed against xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx after Letter Ruling 89-0212 was issued, to the extent xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx would not have owed the tax under the application of Letter Ruling 89-0212. This abatement would apply to liabilities arising prior to the date Letter Ruling 89-0212 was issued because xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx would presumably have filed returns and paid such taxes had the letter ruling stated that tax was owed.

Penalties for Failure to File Returns

For tax returns due on and after January 1, 1994, Section 3-3(a), (a-5) and (a-10) of the Uniform Penalty and Interest Act (the "UPIA"; 35 ILCS 735/3-1 *et seq.*) impose a penalty for failure to timely file a return. The penalty is based on the amount of tax required to be shown due on the return. For returns due in years prior to the effective date of the UPIA, Section 1001 of the IITA provided a penalty for failure to timely file a return, also based on the amount of tax required to be shown due on the return.

Section 3-8 of the UPIA provides that no penalty for failure to file a return shall be imposed if the taxpayer's failure was due to "reasonable cause." Similarly, Section 1001 of the IITA, as in effect prior to the effective date of the UPIA, provided that no penalty for failure to file a return would be imposed if the failure was "due to reasonable cause and not willful neglect."

Letter Ruling 89-0212 cannot serve as a basis for a finding of reasonable cause for failure by xxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx to file returns, because it expressly states that a return is due even if no tax liability is owed. However, in providing that xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx would report no Illinois income tax liability on its returns, the ruling indicated that no penalty would be due for failure to file a return. Accordingly, Section 4(c) of the Taxpayers' Bill of Rights Act requires abatement of any penalty for failure to timely file a return, to the extent the penalty would be based on taxes required to be abated under Section 4(c), pursuant to the ruling above.

Effective Date of Revocation of Letter Ruling IT 89-0212

Letter Ruling IT 89-0212 is revoked as of July 13, 2001, the date of this ruling. xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxx shall comply with the provisions of this ruling for all tax years ending on or after July 13, 2001, except that no penalty shall be imposed for failure to make timely payment of any installment of estimated tax due prior to July 13, 2001, because Section 4(c) of the Taxpayers' Bill of Rights Act would require abatement of any such penalty.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

Very truly yours,

Paul Caselton
Deputy General Counsel -- Income Tax

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[1] xxxxxxxxxxxxxxxxxxxxxxxx subcontracts certain materials and for the erection of buildings. The corporations are unitary. xxxxxxxxxxxxxxxxxxxxxxx is being phased out.